STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 10, 2010
v	No. 291596 Wayne Circuit Court
ROBERT LIONEL MANGHAM, Defendant-Appellant.	LC No. 07-015022-01-FC

Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

PER CURIAM.

Defendant was convicted after a bench trial of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court found defendant not guilty of being an aider or abettor to first or second degree murder. The trial court initially sentenced defendant to the statutory two years' imprisonment for felony-firearm and to 17 months' to four years' imprisonment for felonious assault. Defendant previously appealed the latter sentence, which the prosecutor confessed was an erroneous departure from the sentencing guidelines, which called for an intermediate sanction. This Court vacated defendant's felonious assault sentence and remanded for resentencing. On remand, the trial court imposed the same sentence. Defendant again appeals his sentence for felonious assault. Defendant does not appeal his convictions or his mandatory two-year term of imprisonment for felony firearm. We affirm defendant's sentence but remand for correction of his guidelines score.

This case arises out of the shooting death of Lametrius Carter. Although the various witnesses gave different stories about the details of how Carter was shot, it was undisputed that defendant was present at the shooting and was armed, but that defendant never fired his gun. Defendant's brother, Stanley Mangham, whose whereabouts are apparently still unknown, shot Carter. Also present was Carter's friend, Damin Hagan, at whom defendant was found to have pointed his gun at some point. The trial court found that defendant had been knowingly and intentionally involved with his brother in "setting up" Carter, apparently due to a dispute that had transpired earlier in the day, but that there was not enough evidence to find beyond a reasonable doubt that defendant knew that his brother would actually shoot Carter. There was conflicting evidence as to whether Carter was armed, but the trial court found incredible the testimony tending to indicate that Carter had produced a gun.

Defendant first argues on appeal that his sentencing guidelines were erroneously scored. We agree with the prosecutor that as a general matter, defendant's acknowledgement below that

his guidelines scores were correct would waive appellate review. See *People v Walker*, 428 Mich 261, 264-268; 407 NW2d 367 (1987), abrogated in part on other grounds by *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997). However, defendant contends that the basis for his challenge is found in *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), which was not decided by our Supreme Court until July 28, 2009, almost six months after his resentencing. Presuming the truth of this assertion, it would have been impossible for defendant to raise a then-nonexistent challenge, somewhat obviating the primary purpose of issue preservation requirements, which is to compel parties to do all they can to avoid the need for appellate review. In any event, this issue is strictly a matter of law and all of the necessary facts have been placed on the record below, so we choose to review the matter for completeness. *People v Giovannini*, 271 Mich App 409, 414-415; 722 NW2d 237 (2006)

Defendant contends that offense variable (OV) 1, OV 3, and OV 9 were incorrectly scored. An unpreserved objection to the scoring of offense variables is reviewed for plain error. *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007). However, the correct interpretation of the guidelines themselves is reviewed de novo as a question of law. *McGraw*, *supra*, 484 Mich at 123. We agree with defendant in part.

OV 1 is scored for "aggravated use of a weapon," and it should be scored at 25 points if, in relevant part, a "firearm was discharged at or toward a human being." MCL 777.31(1)(a). OV 1 should be scored at 15 points if a "firearm was pointed at or toward a victim." MCL 777.31(1)(c). Defendant was convicted of felonious assault with a firearm. The evidence at trial was unequivocal that defendant never fired a gun at any point during his participation in the felonious assault. A gun clearly *was* discharged at a human being at some point during that encounter. But unless a guideline specifically instructs otherwise, it must be scored *only* on the basis of conduct occurring strictly within the confines of the offense for which the defendant is convicted. *McGraw*, *supra*, 484 Mich at 124-129. Therefore, *during the course of defendant's felonious assault*, no gun was discharged, but a gun was pointed at a victim. OV 1 should have been scored at 15 points, not 25.

OV 3 is scored for "physical injury to a victim," and it should be scored at 100 points if "[a] victim was killed." MCL 777.32(1)(a). Critically for the proper scoring of OV 3, a "victim" for the purposes of OV 3 "includes any person harmed by the criminal actions of the charged party," and it is not limited "only to the victim of the charged offense." *People v Albers*, 258 Mich App 578, 592-593; 672 NW2d 336 (2003). The trial court found that defendant was involved in "setting up" Carter in concert with defendant's brother, and defendant certainly facilitated the transaction that culminated in Carter's death, notwithstanding the trial court's finding that there was no evidence defendant knew that his brother would kill Carter. It was not plainly erroneous for the trial court to conclude that defendant's criminal actions contributed to Carter's death, and scoring OV 3 on that basis is permissible notwithstanding the fact that Carter was not the victim of defendant's charged offense. OV 3 was properly scored at 100 points.

OV 9 is scored for the "number of victims," and it should be scored at 10 points if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death." MCL 777.39(1)(c). Defendant relies on inapposite authority for the proposition that this guideline was improperly scored. In *McGraw*, our Supreme Court explained that OV 9 may not be scored for conduct occurring after the charged crime was completed, so OV 9 cannot necessarily be scored on the basis of any conduct occurring at any time during the entire criminal transaction.

McGraw, *supra*, 484 Mich at 131-135. However, our Supreme Court also emphasized that OV 9 may properly be scored on the basis of the potential threat to all individuals present at the scene of, and during, the commission of the crime. *Id*., 484 Mich at 129. There was evidence in this case that defendant pointed his gun into Carter's vehicle while Hagan and Carter were both present inside the vehicle, and that defendant could not see into the vehicle at the time. Clearly, two people were placed in danger during defendant's conduct, and the trial court did not err in scoring OV 9 accordingly. OV 9 was properly scored at 10 points.

We observe that defendant's felonious assault conviction is a Class F offense, and his prior record variable (PRV) score was 2. Correction of defendant's guidelines changes his total offense variable score from 150 points to 140 points. Because defendant's offense variable score remains higher than 75 points, this correction does not affect defendant's minimum sentence range of 2 to 17 months. See MCL 777.67. Therefore, defendant's sentencing information should be corrected with the proper score for OV 1, because it might, for example, possibly have some bearing on parole eligibility. However, defendant's sentence is not affected.

Defendant then contends that the trial court erred by exceeding the maximum sentence to which he should have been subjected under the statutory sentencing guidelines without articulating on the record a substantial and compelling reason for doing so. We disagree.

There is no dispute in this case that, because defendant's sentencing guidelines range was "18 months or less," the trial court was required to impose an "intermediate sanction." MCL 769.34(4)(a); *People v Muttscheler,* 481 Mich 372; 750 NW2d 159 (2008).. "An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less." MCL 769.34(4)(a). An "intermediate sanction" also "means probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed." MCL 769.31(b). Thus, it "can mean a number of things, but it does not include a prison sentence," and in order to impose a prison sentence—even one that does not "exceed the upper end of the range established by the guidelines," as was the situation here—the trial court must set forth substantial and compelling reasons on the record for doing so. *People v Stauffer*, 465 Mich 633, 635-636; 640 NW2d 869 (2002).

Our Supreme Court has explained that "substantial and compelling reasons" are exceptional circumstances that are objective, are verifiable, and "keenly" or "irresistibly" grab the court's attention. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). This Court reviews for clear error the trial court's determination that any given factor justifying a departure exists. *Id*. at 264-265. Whether any given factor is objective and verifiable—meaning "that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed"—is reviewed de novo as a matter of law. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). And whether any given factor is substantial and compelling is reviewed for an abuse of discretion. *Babcock*, *supra*, 469 Mich at 264-265. At all times, however, this Court must be careful to recognize that the trial court is inherently in the superior position to make the ultimate determination that there are substantial and compelling reasons to warrant the departure. *Id*. at 270. The trial court is not obligated to use any talismanic language, but this Court's review is limited strictly to what the trial court *actually articulated on*

the record, irrespective of whether this Court might independently believe that the departure was properly justified. *Babcock*, *supra*, 469 Mich at 258-259; 259 n 13.

The trial court here placed the following explanation on the record at resentencing:

> Yeah, I know why you're here. And I have to state, I'll give everybody an opportunity to speak. But, you know, they, obviously, don't live in the City of Detroit. They, obviously, didn't realize a man was dead.
>
> This wasn't a joke. This wasn't—and a young man who's left here a little—oh, here he is. He just walked back in the door. Felonious assault where some guys got into a fight, a bunch of them fighting, and somebody hit somebody with a piece of concrete, and somebody hit somebody else with a baseball bat.
>
> This was a shooting. People driving around, shooting folks, leaving them on the street to die. And I couldn't be sure under the circumstances whether this defendant, at the time I heard the waiver trial, actually intended to kill. But I knew that he intended that they were going to fire on some folks with a gun. Felonious assault.
>
> And then the Court wants to know why I did not—I could articulate, very frankly, things why I should have gone above the guidelines.
>
> But be that as it may, they make more money than I do, and they're the Court of Appeals. They don't have to have common sense.
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> * * *
>
> And if I remember correctly, now it's coming back to me, that [the victim and Hagan] were driving down the street. And it's [defendant's] brother, who we're still looking for, who is the codefendant that we've never found, who fired the fatal shot. And I thought it was a setup then, and I think it was a setup now.
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> This man got killed needlessly. And at the time that [defendant] assisted, he knew. Because he and his brother were sitting out there and he laughed at me about—I think it was tequila. What is it? Something called 1800, and I thought it was a vodka, but it's a tequila. It was up on the porch, which happened to have been somebody's favorite drink, but nobody could remember how it got on the porch.
>
> They intended to confront this man. It's been going on for a while. He knew that his brother was going to confront him. He knew he had the gun.
>
> The best I could do for him was to find him guilty of felonious assault, because he knew his brother was going to assault him with a gun. They both went down off the porch. He knew his brother had that gun.
>
> And there was no reason to give him probation under these circumstances. It didn't have to happen. He could have stayed on his porch.
>
> The reason why, for the Court of Appeals, the reason why I did not give him probation is because the man died a needless death, and this man took part in that death.

> Further, I think to give him probation on this would just tell the rest of the City of Detroit, just keep riding around, walking down the street with guns, fighting and shooting whoever you want, and when you get to court, expect the Court of Appeals to say, "well, you should have given him probation."
>
> No. This didn't have to happen. It had been going on, if I remember, all day. The sentence stands as is. Thank you.

The trial court's initial sentence appeared premised on the belief that it was not a departure.

The trial court therefore appears to have provided three reasons in support of its upward departure from an intermediate sanction: because a person died as at least a partial consequence of defendant's criminal conduct; because an intermediate sanction would cripple any deterrent effect of the instant criminal prosecution; and because although the court could not find defendant guilty beyond a reasonable doubt of aiding and abetting murder, defendant had voluntarily participated in an unnecessary armed confrontation with the knowledge that gunfire would be exchanged. Of these reasons, only the latter is an adequate substantial and compelling reason for a departure.

The first reason, that someone died, is already accounted for by scoring OV 3 at 100 points. The trial court may base a departure on a characteristic already accounted for if it finds "that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b); *Babcock, supra*, 469 Mich at 267-268. There is no indication in the record that the trial court did so here, however. Rather, the trial court simply stated that its departure was primarily based on the bare fact that, as warranted OV 3's scoring at 100 points, a victim was killed. The trial court is not obligated to use any talismanic language, but this Court's review is nevertheless limited strictly to what the trial court *actually articulated on the record*, irrespective of whether this Court might independently believe that the departure was properly justified. *Babcock, supra*, 469 Mich at 258-259; 259 n 13.

The second reason, deterrence, is generally an appropriate consideration when crafting a sentence. *People v Schultz*, 435 Mich 517, 531-532; 460 NW2d 505 (1990); see also *People v Solmonson*, 261 Mich App 657, 272 n 4; 683 NW2d 761 (2004). However, deterrence is a factor to be considered *within* the discretion afforded by the Legislature. *People v Sabin*, 242 Mich App 656, 661-662; 620 NW2d 19 (2000). The statutory sentencing guidelines already take such considerations as deterrence into account, and deviation from the guidelines is intended to allow judges to modify the presumptive sentence in exceptional cases on the basis of circumstances unique to a given defendant. See *People v Daniel*, 462 Mich 1, 7 n 8; 609 NW2d 557 (2000). The underlying consideration behind a deviation from the guidelines is proportionality; specifically, tailoring a sentence to be proportionate to the crime and to the defendant, which the guidelines presumptively already accomplish. *Babcock, supra*, 469 Mich at 261-264.

The Legislature has determined that an intermediate sanction is appropriately proportionate, with the appropriate quantum of deterrence, for a felonious assault conviction under the circumstances of this case as computed under the sentencing guidelines. The trial court's conclusion that probation or a jail sentence is simply not sufficient to deter similar future criminal activity may be correct, but the courts cannot second-guess the wisdom of the Legislature. The trial court impliedly stated that the deterrence was insufficient because this was

an extraordinary felonious assault because a gun was involved, but MCL 750.82 already includes the use of a gun in the definition of the crime. And, as discussed, the fact that someone died was accounted for by scoring OV 3 at 100 points.

Finally, the trial court explained that, even though it could not find evidence beyond a reasonable doubt that defendant knew his brother would actually *kill* Carter, the evidence clearly showed that defendant "knew that he intended that they were going to fire on some folks with a gun," and that it was a "setup" confrontation. The trial court did not use the word "premeditation," but it unambiguously found that defendant's participation in a staged armed confrontation was, in fact, premeditated. In other words, for all intents and purposes, the only reason defendant was not guilty of first-degree premeditated murder was the lack of sufficient evidence that defendant intended anyone to die, per se. As the trial court observed, this was not an ordinary felonious assault: it was a much more egregious situation, albeit one that fell short of outright murder.

A defendant's intent, while itself technically subjective, can be established in an "objective and verifiable" way that will suffice for consideration when a trial court departs from the sentencing guidelines. *People v Claypool*, 470 Mich 715, 728-730; 684 NW2d 278 (2004) (TAYLOR, J; Justices MARKMAN, CAVANAGH, KELLEY, and WEAVER either explicitly or impliedly agreed). There was ample objective evidence to show that defendant willingly participated in what he knew would be an armed confrontation, and the trial court did not abuse its discretion by concluding that this was substantial and compelling and not adequately accounted-for by defendant's conviction for felonious assault. We find that the trial court's final reason for its sentencing departure was "substantial and compelling."

Because the trial court articulated three reasons for its departure, only one of those reasons was "substantial and compelling," we must determine whether the trial court would have departed upward from the guidelines range on the basis of that reason alone. *Babcock*, *supra*, 469 Mich at 260-261. The trial court did not explicitly say it would, but although this would have been the better practice, it is unnecessary. *Id*. at 260 n 15. From reading the trial court's discussion as a whole, it is undisputable that the trial court would have departed upward even if deterrence and the death had not been found "substantial and compelling." The trial court clearly found defendant's participation in a scenario that went beyond an ordinary felonious assault to be a substantial and compelling reason for the departure all by itself. Moreover, the trial court did not pick an arbitrary departure amount, but rather sentenced defendant to the maximum to which he could have been sentenced under the guidelines if an intermediate sanction had not otherwise been required. We conclude that the trial court would have departed by the same amount solely on the basis of defendant's participation in this "setup" even without giving special consideration to the death and to the need for deterrence.

In summary, the trial court articulated substantial and compelling reasons for its departure from the legislative sentencing guidelines, which required imposition of an "intermediate sanction." Although not all of the reasons articulated by the trial court were "substantial and compelling," the trial court would have made the same departure on the basis of the reasons that were.

Defendant's sentence is affirmed, but because OV 1 should have been score at 15 points instead of 25, we remand for correction of his guidelines score. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Alton T. Davis